(1) Supreme Court, U.S.
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# In The Supreme Court of the United States

ANTHONY TAYLOR,

*Petitioner,*

v.

COMMONWEALTH OF PENNSYLVANIA,

*Respondent.*

**On Petition for a Writ of Certiorari to the Pennsylvania Supreme Court**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. WHETHER THE PENNSYLVANIA SUPREME COURT, IN CONFLICT WITH THE DECISIONS OF THIS HONORABLE COURT, ERRED IN RUFUSING TO SUPPRESS THE EVIDENCE, WHERE THE SEARCH OF THE SEPARATE BUSINESS WAS NOT WITHIN THE SCOPE OF THE SEARCH WARRANT, WAS NOT A VALID PROTECTIVE SWEEP, WHERE THERE WAS NO REASONABLE ARTICULABLE SUSPICION TO BELIEVE THAT PETITIONER TAYLOR WAS ARMED AND WHERE AN APPLICATION OF THE "PLAIN FEEL" DOCTRINE WOULD NOT SUPPORT THE SEARCH OF PETITIONER TAYLOR.

## PARTIES TO THE PROCEEDING

Petitioner

Anthony Taylor

Respondent

Commonwealth of Pennsylvania

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## OPINIONS BELOW

The opinion and order of the Supreme Court of Pennsylvania was announced on May 23, 2001. A copy of the opinion is included in the Appendix at Appendix page 1. The opinion and order of the Pennsylvania Superior Court was filed on October 31, 1997. A copy of the opinion is included in the Appendix at Appendix page 20. The opinion of the Court of Common Pleas of Allegheny County was filed on February 5, 1997. A copy of the opinion is included in the Appendix at Appendix page 31.

## JURISDICTION

This Petition for Writ of Certiorari is filed within 90 days of the decision of the Pennsylvania Supreme Court on May 23, 2001. This Honorable Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

## STATEMENT OF THE CASE

Petitioner Anthony Taylor was charged by Criminal Information filed on March 22, 1995 at No. CC9502985 in the Court of Common Pleas of Allegheny County, Pennsylvania with one(1) count of Possession With Intent to Deliver Controlled Substance, Drug, Device or Cosmetic (35 P.S. §780-113(a)(30)) (heroin); one(1) count of Possession With Intent to Deliver Controlled Substance, Drug, Device or Cosmetic (35 P.S. §7870-113(a)(30)) (cocaine); one(1) count of Possession Controlled Substance, Drug, Device or Cosmetic (35 P.S. §780-113(a)(16)) (heroin); one(1) count of Possession Controlled Substance, Drug, Device or Cosmetic (35 P.S. §780-113(a)(16)) (cocaine); one(1) count of Possession or Distribution of Small Amount (35 P.S. §780-113(a)(31)) (marijuana).

On December 18, 1996, the trial court entered an Order of Court granting Mr. Taylor's written suppression motion.

The facts of the criminal incident as found by the trial court in its opinion are as follows:

> The Duquesne Police Department had received numerous complaints about drug trafficking activity taking place at the G-Service Convenience Store located at 418 Crawford Avenue in Duquesne, Pennsylvania. In response to those complaints, a surveillance officer was sent to that location to observe the activity at or near the store. On December 13, 1994 and January 4, 1995, that officer maintained surveillance of the store for more than three hours and recorded his observations concerning the patrons who visited the establishment and the length of time that they were in the store. Based upon the number of people and the length of time that they had spent in the store, an affidavit of probable cause was completed and submitted tot he local district magistrate requesting that search warrants be issues for the G-Service Convenience Store and the residence of that store's proprietor, Eric Gooden, (hereinafter referred to as "Gooden").On January 20, 1995, search warrants were obtained for these two locations and the police effectuated those searches. It is the search of the G-Service

Convenience Store which is the subject of the current appeals. The arresting police officers went into the G-Service Convenience Store and searched the premises finding Gooden and a significant quantity of crack cocaine behind the counter. Having found this contraband, two of the members of the search team were directed to go down the steps of his building into another area and continue the search. In the basement of this building, a barbershop business was being conducted. That business had two barber chairs and all of the necessary equipment one would expect to find in a barbershop.

When the officers entered this barbershop, the observed Anthony Taylor, (hereinafter referred to as "Taylor"), seated in a barber's chair with a black plastic apron covering his torso, getting a hair cut from John Mahone, Jr., (hereinafter referred to as "Mahone"). One of the officers, Richard Scott Adams, announced that they were police officers conducting search for drugs. Officer Adams testified that he observed Taylor's hands moving under the apron and he removed Taylor's apron and decided to search Taylor's pocket which was subsequently removed and that object, a plastic prescription bottle, appeared to contain crack cocaine. Once Taylor was searched and handcuffed,

> Officer Adams then instructed a fellow officer to search the two coats that were hanging in on the coat rack. These coats belonged to Mahone and Taylor and the searches of these coats revealed that Taylor had additional pieces of crack in his coat and Mahone had several baggies containing marijuana. The results of these searches, both upstairs and downstairs, provided the predicate for the criminal prosecutions filed against Mahone, Taylor and Gooden.

(Opinion of the trial court at Appendix page 33).

The Commonwealth of Pennsylvania timely filed a consolidated appeal to the Superior Court of Pennsylvania and on October 31, 1997, the Superior Court panel vacated the order of the trial court. On May 23, 2001, the Supreme Court of Pennsylvania affirmed the order of the Superior Court.

## REASONS FOR GRANTING THE PETITION

The case presents an issue which Petitioner believes should be addressed by this Honorable Court. The decision of the Supreme Court of Pennsylvania to affirm the order of the Superior Court of Pennsylvania was contrary to established case law as the search of the separate business was not within the scope of the search warrant or a valid protective sweep, there was no reasonable articulable suspicion to support the notion that Petitioner Taylor was armed and an application of the "plain feel" doctrine would not support the search of Taylor.

In the present case, police officers executed a search warrant which authorized a search of a convenience store, located at 418 Crawford Avenue, in the Duquesne section of Allegheny County as well as the proprietor of the store, Eric Gooden. The police had information that drugs were being sold out of the store and had made one controlled buy of crack cocaine from the store. Upon executing the warrant on the first floor of the store, the police found a quantity of crack cocaine. They immediately arrested Eric Gooden. After arresting Gooden, officer then went into a separate business, a barbershop, where they confronted two men. One of the men, Anthony Taylor, was sitting in a barber chair getting his hair cut by another man, John Mahone. The officers patted Taylor down, felt a hard object in his pant pockets which did not feel like a knife or gun, and removed it and discovered a large vial.

The Trial Court suppressed all evidence, ruling that the officers had no right to go into the separate business on another floor.

In the present case, officers secured a search warrant to search the following:

> Person of Eric Gooden-B/M-Age 29-Dark Skinned 418 Crawford Avenue Duquesne PA 15110 – Corner of Crawford & 5th Street – 2 store White Brick. A white sign is above the entrance labeled (sic) "G-Service Convenience Store[“] & 2 phone numbers 466-1071 and 466-1061 painted in red (also a picture of a car on the sign)

The affidavit in support of the application for search warrant laid out the circumstances of the surveillance of the convenience store and of a controlled "buy" there.

As a result of the aforementioned surveillance and controlled buy, the search warrant was issued for the G-Service Convenience Store and the person of Eric Gooden.

When the officers descended the stairs to the separate business, they discovered Mr. Taylor sitting in a barber chair getting a haircut from Mr. Mahone. Mr. Taylor was wearing a black barbering apron. Chief Adams of the Duquesne Police testified that he believed that there was only one entrance and one exit to the building but that he wasn't sure if the basement had a separate exit. Thus, one way to enter the separate business basement barbering area was by walking down the stairs off the main entrance to the building.

In its ruling that the evidence should be suppressed, the trial court found that the "G" Service Convenience Store was a separate establishment, from the barbering business, and thus a search warrant for the convenience store would not authorize a search of the barbershop. In making its finding of fact, the trial court established definitively that the "G" Service Convenience Store was not a part of the barbering establishment.

In the present case, there were plenty of tipoffs to alert the officers to the fact that the basement barbershop business was being used as a separate business premise. It is noteworthy, as was found by the trial court, that it was a distinct facility from the convenience store, with two barber chairs, barbering equipment and that it contained an individual getting a haircut from another individual who was administering a haircut as police entered. One does not encounter such things in a convenience store.

In Maryland v. Garrison, 107 S. Ct. 1013 (1987) this Honorable Court established the standard for searches akin to the search in the case at bar as follows:

> The question whether the execution of the warrant violated respondent's constitutional right to be secure in his home is somewhat less clear. We have no difficulty concluding that the officers' entry into the third-floor common area was legal; they carried a warrant for those premises, and they were accompanied by McWebb, who provided the key that they used to open the door giving access to the third floor common area. If the officers had known, or should have known, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obliged to limit their search to McWebb's apartment. Moreover, as the officers recognized, they were required to discontinue the search of respondent's apartment as soon as they discovered that there were two separate units on the third floor and therefore were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant.

Garrison, supra, 1017-1018

In the present case, as indicated, there were a plethora of items to indicate that the convenience store and the barbershop were distinct stores where entirely different services were available.

Further, there were no reasonable, articulable facts to establish that any adjacent area harbored individuals who posed any danger. Maryland v. Buie, 494 U.S. 325 (1990)

Once in the barbershop, the officers in question were able to observe Anthony Taylor sitting in a barber chair covered with an apron and Mr. Mahone cutting Anthony Taylor's hair. The officer conducted a pat-down and felt, in Mr. Taylor's pocket, a hard object which did not feel like a gun or a knife. This search of Mr. Taylor was improper.

Assuming arguendo that reasonable suspicion was aroused, the officer would have been authorized to conduct a carefully limited search of the outer clothing of Mr. Taylor in an attempt to discover weapons which may have been used against him. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). Because the "sole justification of the search ... is the protection of the police officer and others nearby ... it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." Terry v. Ohio, supra, 392 U.S. at 29, 88 S.Ct. at 1884.

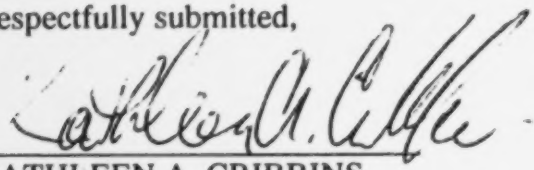
The officer was unable to testify that the bulge felt like a specific weapon. Furthermore, he never indicated that he perceived what he felt to be contraband. Given the lack of evidence that the officer reached into Mr. Taylor's pocket because he feared Mr. Taylor had a weapon or drugs, the search exceeded the bounds of a Terry search in violation of Mr. Taylor's constitutional rights. Because the search of Mr. Taylor was illegal, the fruits that arose therefrom, could properly be suppressed. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963).

## CONCLUSION

WHEREFORE, Petitioner Anthony Taylor respectfully requests that his Petition for Writ of Certiorari be granted.

This is the 21st day of August, 2001.

Respectfully submitted,



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# APPENDIX

## APPENDIX

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**(J-130A/B-1999)**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**WESTERN DISTRICT**

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | : | No. 34 W.D. Appeal Docket 1999 |
| Appellee | : | Appeal from the Order of the Superior Court entered October 31, 1997 at No. 52 PGH 1997, reversing the Order of the Court of Common Pleas of Allegheny County entered December 18, 1996 at No. CC 9502985 |
| v. | : | |
| ANTHONY TAYLOR | : | |
| Appellant | : | ARGUED: September 14, 1999 |
| COMMONWEALTH OF PENNSYLVANIA | : | No. 80 W.D. Appeal Docket 1998 |
| Appellee | : | Appeal from the Order of the Superior Court entered October 31, 1997 at No. 53 PGH 1997, reversing the Order of the Court of Common Pleas of Allegheny County entered December 18, |
| v. | : | |
| JOHN MAHONE, JR. | : | |
| Appellant | : | |

: 1996 at No. CC
: 9516023
:
: ARGUED: September
: 14, 1999

**OPINION ANNOUNCING JUDGEMENT OF COURT**

**MADAME JUSTICE NEWMAN** **DECIDED: MAY 23, 2001**

Anthony Taylor (Taylor) and John Mahone (Mahone) appeal from the Superior Court's Order, which reversed the suppression of evidence seized during the execution of a search warrant for a convenience store. The present consolidated appeal questions whether the searches conducted in the basement of the convenience store and the subsequent seizures of evidence violate the Fourth Amendment to the United States Constitution. Because we disagree with portions of the Superior Court's decision, we affirm the order of the Superior Court in part and reverse in part.

## FACTS AND PROCEDURAL HISTORY

The Duquesne Police Department received numerous complaints about drug trafficking activity in the G-Service Convenience Store at 418 Crawford Avenue, in Duquesne, Pennsylvania. In response to the complaints, the police set up surveillance outside the store. On December 13, 1994 and January 4, 1995, the surveillance officer noted the patrons who visited the store and the short length of time many of those patrons spent inside the store. Several weeks later, the police sent a confidential informant into the store to make a controlled buy. The informant returned with crack

cocaine that he had purchased from Eric Gooden, the owner of the G-Service Convenience Store.

Based upon the information gathered from the surveillance and the informant's controlled buy, the police obtained a search warrant authorizing a search of the G-Service Convenience Store. On January 20, 1995, a search team effectuated the warrant. Inside the store, the police found Gooden and a large quantity of crack cocaine behind a counter. While part of the search team remained with Gooden, two officers went down a set of stairs and into the basement of the building.

In the basement, the officers encountered Taylor, sitting in a barber's chair and wearing a black plastic apron over his torso. The police observed Mahone cutting Taylor's hair. The basement contained one other barber's chair and some hair-cutting equipment.

After the officers announced their presence, Officer Richard Scott Adams (Officer Adams) noticed Taylor's hands moving underneath the plastic apron. Fearing that Taylor could be reaching for a weapon, Officer Adams removed the apron and patted the exterior [J-130A/B-1999] – 2 of Taylor's pocket. Officer Adams felt a hard object and removed it from Taylor's pocket. The object was a plastic prescription bottle, which appeared to contain crack cocaine.

After arresting Taylor and placing him in handcuffs, Officer Adams searched Mahone. Officer Adams did not find anything incriminating on Mahone. Then, Officer Adams handcuffed Mahone, while Constable Gordon McIntyre (Constable McIntyre) searched two coats, which were draped on a chair ten feet from Taylor and Mahone. Constable McIntyre discovered additional pieces of crack in Taylor's coat and several baggies containing marijuana in Mahone's coat.

The police charged both Taylor and Mahone with possession of a controlled substance [1] and possession of a

[1] The Controlled Substance, Drug, Device and Cosmetic Act, Act of April 14, 1972, P.L. 233, as amended, 35 P.S. § 780-113(a)(16).

controlled substance with intent to deliver.[2] Both men filed motions to suppress the evidence seized from them, which the suppression court granted. The court held that, while the warrant for the search of the convenience store had been valid, the searches of Taylor and Mahone had exceeded the scope of the warrant.

The Commonwealth certified in good faith that the suppression of the evidence terminated or substantially handicapped its prosecution, and appealed to the Superior Court. See 42 Pa.C.S. § 934; Pa.R.A.P. 311(d). In a fragmented memorandum opinion, the Superior Court reversed the suppression of the evidence. Writing for the court, Judge, now Justice, Saylor concluded that the search of the basement barbershop had been outside the scope of the warrant, however, the search could be justified as a legitimate protective sweep of the premises in conjunction with the arrest of Gooden. Judge Olszewski filed a concurring opinion in which he disagreed that the search of the basement could be justified as a protective sweep. In his view, the search of the basement had been [J-130A/B-1999] – 3 lawful because the barbershop is open to the public, and therefore Taylor and Mahone did not have a reasonable expectation of privacy in the basement. Judge Popovich dissented and stated that he could have affirmed based on the reasoning of the suppression court. We granted Petitions for Allowance of Appeal filed by Taylor and Mahone to consider whether the searches conducted in the basement were beyond the scope of the warrant, and if so, whether such searches were reasonable under the Fourth Amendment.

## DISCUSSION

When the Commonwealth appeals an order suppressing evidence, we apply the following standard of review:

> [W]e consider only the evidence of the defendant's witnesses and the evidence of the prosecution that, when

[2] 35 P.S. § 780-113(a)(30).

> read in the context of the entire record, remains uncontradicted. We are bound by the [suppression] court's findings of fact if they are supported by the record, but we must examine any legal conclusions drawn form those facts.

Commonwealth v. Pickron, 634 A.2d 1093, 1096 (Pa. 1993). With this standard in mind, we will first examine whether the searches conducted in the basement were within the scope of the search warrant.

Scope of the Warrant

Both lower courts found that the search of the basement of the convenience store fell outside the scope of the warrant. The Superior Court concluded that because Gooden and the G-Service Convenience Store, not the basement, were the targets of the police investigation, the search of the basement exceeded the scope of the warrant. Super. Ct. Op., at 5. Thus, the Superior court agreed with the suppression court that prior to the execution of the warrant and the entry into the building by the police, the Duquesne Police Department lacked probable cause to search the basement. We agree. [J-130A/B-1999] - 4

The Warrant Clause of the Fourth Amendment to the United States Constitution prohibits the issuance of any warrant unless based upon "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend IV. The scope of a lawful search pursuant to a warrant is "defined by the object of the search and the places in which there is probable cause to believe that it may be found." Maryland v. Garrison, 480 U.S. 79, 84 (1987); Commonwealth v. Kiessling, 552 A.2d 270, 272 (Pa. Super. 1988), allocatur denied, 562 A.2d 825 (Pa. 1989).

In the present case, the police possessed a valid warrant to search the G-Service Convenience Store. The warrant described the place to be searched as:

> 418 Crawford Ave[.] Duquesne[,] PA 15110 - - Corner of Crawford & 5th Street-2 story White Brick. A white sign is above the entrance labled (sic) "G-Service Convenience Store[“] & 2 phone numbers 466-1071 and 466-1061 painted in red (also a picture of a car on the sign)[.]

Search Warrant (R.R. 17a). The affidavit of probable cause repeatedly emphasized that the investigation and surveillance focused on the G-Service Convenience Store and did not mention the basement barbershop. Application for Search Warrant and Affidavit of Probable Cause )R.R. 17a-19a). While the barbershop was located in the same building as the convenience store, the suppression court found the barbershop to be a separate and distinct facility from the convenience store. The record, which contains evidence that the basement housed only barbershop equipment and activity, sufficiently supports the finding of the suppression court. Because the barbershop existed as a separate facility from the convenience store and the police did not have probable cause to believe that drug activity had occurred in the barbershop, the basement barbershop fell outside the scope of the warrant issued to search the convenience store.
[J-130A/B-1999] – 5

Protective Sweep

While the search of the basement extended beyond the scope of the warrant, this search may nonetheless be justified under the Fourth Amendment. The Commonwealth asserts, and the Superior Court agreed, that the police entered the basement as part of a legitimate protective sweep. The Superior Court noted that while it is unclear from the record whether there was a door that physically separated the first floor of the convenience store from the basement, the record did show that persons entering the store could pass freely between the first floor and the basement. Given the

possibility that the police may have reasonably believed that other individuals were on the premises who could threaten the officers' safety, the Superior Court found that the officers properly conducted a protective sweep of the basement after arresting Gooden. We agree.

Not every search must be conducted pursuant to a warrant, for the Fourth Amendment bars only unreasonable searches and seizures. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995). While a search is generally not reasonable unless executed pursuant to a warrant, the Supreme Court of the United States and this Court have recognized exceptions to the warrant requirement. See, e.g., Colorado v. Bertine, 479 U.S. 367, 371-72 (1987) (inventory search); New York v. Burger, 482 U.S. 691, 701-703 (1987) (administrative search of a closely regulated business); Terry v. Ohio, 392 U.S. 1, 27 (1968) (pat-down frisk); Commonwealth v. Miller, 724 A.2d 895, 900 (Pa. 1999), cert. denied, ____ U.S. ____, 120 S.Ct. 242 (1999) (emergency situation); Commonwealth v. Morris, 644 A.2d 721, 723-24 (Pa. 1994), cert. denied, 513 U.S. 1031, (1994) (protective search). One well-recognized exception to the warrant requirement is the protective sweep.

A protective sweep is "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." Maryland v. Buie, 494 U.S. 325, 327 (1990). Buie sets forth two levels of protective sweeps. Id. At 334. The two levels are defined thus: [J-130A/B-1999] – 6

> [A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those

> facts, would warrant a reasonable prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

Id. Pursuant to the first level of a protective sweep, without a showing of even reasonable suspicion, police officers may make cursory visual inspections of spaces immediately adjacent to the arrest scene, which could conceal an assailant. The scope of the second level permits a search for attackers further away from the place of arrest, provided that the officer who conducted the sweep can articulate specific facts to justify a reasonable fear for the safety of himself and others.

We have recognized the exigency created by the existence of hidden third parties during an arrest. See Commonwealth v. Norris, 446 A.2d 246, 249 (Pa. 1982). In Norris, we upheld, as a search incident to an arrest, an inspection of a bedroom that resulted in the discovery of a knife visible in plain view. Id. In light of Buie, this "search" is best designated anew as a protective sweep because the goal was to protect the officers in Norris from third parties.

In Norris, the police conducted a warrantless arrest of a suspect wanted for the rape of a young girl at knifepoint. After the police detained the suspect in the living room of the apartment, two officers swept through his bedroom and seized a knife in plain view. As justification for the protective sweep, we found that "the police had every reason to believe a firearm was available to the occupants of the apartment and that one of its usual occupants, appellant's brother, whom appellant had implicated in his threats of harm to the victim, was unaccounted for in the living room." 446 A.2d at 249. We held that, incident [J-130A/B-1999] - 7 to the arrest, the police had authority for the purpose of ensuring their own safety to enter other areas from where they might anticipate danger.[3] Id. At 250.

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[3] Norris, supra, is devoid of facts to indicate the exact proximity of the bedroom to the living room.

Like the officers in Norris, the officers in the present case conducted a valid protective sweep. To decide whether the facts justified a protective sweep, the reviewing court must consider all of the facts objectively and from the position of the reasonably prudent police officer. Buie, 494 U.S. at 327. Because the sweep in the present case extended beyond the area within the immediate vicinity of the arrest, there must be "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonable prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Id. T 334.

Based on the facts in the record and the inferences taken from them, we conclude that the police carried out a proper protective sweep. Officer Adams, one of the two police officers involved in the sweep, testified that a few minutes before he went into the building, he had observed both Taylor and Mahone enter the convenience store on the first floor. N.T. 12/18/96 (Suppression Hearing), at 67-68 (R.R. 86a-87a). Chief Richard Stevens Adams (Chief Adams) recalled that he observed four people in the first floor when the police entered the building; neither Taylor nor Mahone was one of the visible people. N.T. 12/18/96 (Suppression Hearing), at 42-43 (R.R. 61a). The concern for the safety of the officers was best expressed by Officer Adams who testified that, when he saw that the other officers were with Gooden, his "first instinct was to go downstairs to secure that area down there." N.T. 12'18/96 (Suppression Hearing), at 75 (R.R. 94a). None of the officers recalled any door separating the first floor and the basement. See N.T. 12/18/96 (Suppression Hearing), at 56, 69, 79 (R.R. 75a, 88a, 98a), and Chief Adams stated [J-130A/B-1999] - 8 undeniably that the only access to the first floor was from the front door and the basement. N.T. 12/18/96 (Suppression Hearing), at 56 (R.R. 75a). At the direction of one of the officers, Officer Adams and Constable McIntyre proceeded down the steps of the basement.

Clearly, there are specific and articulable facts, which "When taken together with the rational inferences from those facts," would give the police reasonable concerns for their safety. Here, after extensive surveillance and probable cause of illegal activity, the police entered a building to search for narcotics. Once inside the convenience store, the police apprehended Gooden and located a large quantity of a controlled substance but could not confirm the whereabouts of two individuals who had just entered. As the only accessible area adjoining the first floor, the basement provided a logical hiding place for Taylor and Mahone. The police entered the basement under a reasonable belief that third parties were present and could pose a threat to them, therefore exigent circumstances legally justified the protective sweep of the basement.

Because the scope of a protective sweep extends only to a visual inspection of those places in which a person might be hiding and lasts no longer than is necessary to dispel the fear of danger, Buie 494 U.S. at 335, Commonwealth v. Crouse, 729 A.2d 588, 592 (Pa. Supra. 1999), allocatur denied 747 A.2d 364 (Pa. 1999), we address the validity of the searches of Taylor and the two coats.

Search of Taylor

The Superior Court held that once the police officers entered the basement, they were justified in searching Taylor for a potential weapon. Because Taylor began moving his hands under the barber's apron, the court concluded that the officer could have reasonably suspected that Taylor might be armed and dangerous. We agree.

A police officer may conduct a quick frisk for weapons if he or she reasonably fears that the person wit whom he or she is dealing may be armed and dangerous. Terry v. [J-130A/B-1999] – 16 Ohio, 392 U.S. 1, 27 (1968); Commonwealth v. Hicks, 253 A.2d 276, 279 (Pa. 1969). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonable

prudent man in the circumstances would be warranted in the belief that his safety or the safety of others was in danger." Terry, 392 U.S. at 27. The existence of reasonable suspicion to frisk an individual must be judged in light of the totality of the circumstances confronting the police officer. United States v. Cortez, 449 U.S. 411, 418 (1981); In the interest of D.M., 727 A.2d 556, 557 (Pa. 1999).

In light of the totality of the circumstances in the instant case, Officer Adams reasonably suspected that Taylor could be armed and dangerous. Officer Adams and Constable McIntyre discovered Taylor and Mahone while conducting a protective sweep subsequent to the arrest of Gooden and the discovery of a large quantity of crack cocaine. After announcing their presence, the officers told Taylor and Mahone not to move. N.T. 12/18/96 (Suppression Hearing), at 61 (R.R. 80a). Taylor fumbled under the black barber's apron and reached for his pocket. N.T. 12/18/96 (Suppression Hearing), at 62 (R.R. 81a). To protect his safety and the safety of the other individuals in the basement, Officer Adams justifiably touched Taylor's pocket to determine if Taylor had a weapon.

Taylor argues that even if the pat-down of his outer-clothing was reasonable, Officer Adams had no basis for removing the pill bottle from Taylor's pocket. Because Officer Adams knew that Taylor did not possess a weapon and could not be certain that the bottle was contraband, Taylor maintains that this evidence should be suppressed. The Superior Court concluded that Officer Adams felt what he reasonably believed to be a weapon in Taylor's pocket, therefore, Officer Adams justifiably reached into Taylor's pocket. We agree with the Superior Court and find the seizure of the pill bottle to be constitutional. [J-130A/B-1999] – 10 As noted above, the purpose of a frisk under Terry is to discover evidence, but to allow the officer to pursue his investigation without fear for his or her safety. See Adams v. Williams, 407 U.S. 143, 146 (Pa. 1972); Commonwealth v. E. M., 735 A.2d 654, 661, (Pa. 1999). In keeping with that purpose, the scope of a Terry frisk is

limited to that which is necessary for the discovery of weapons. Terry, 392 U.S. at 26; Commonwealth v. Stevenson, 744 A.2d 1261, 1264 (Pa. 2000). Therefore, in order to reach into a suspect's pocket during a frisk, the officer would have to feel something that reasonably appears to be a weapon.[4]

We dealt with the search of a defendant's pocket and the seizure of a bottle in Commonwealth v. Graham. See 721 A.2d 1075 (Pa. 1998). In Graham, Officer Dawley had been on patrol alone, late at night, when he confronted three individuals. In order to effectuate an arrest of one of the individuals, Officer Dawley had to turn his back on the defendant, whom Officer Dawley noticed had a bulge in the front pocket of his pants. Officer Dawley patted the bulge and concluded that it was money. Then, Office Dawley patted the defendant's back pockets and felt what he believed to be a Lifesavers Holes bottle. Officer Dawley shined a flashlight down into the pocket and discovered a Lifesavers Holes container full of crack cocaine.

In examining the search of the defendant, we concluded that Officer Dawley had been reasonable in initiating a frisk of the defendant for weapons. Graham, 721 A.2d at 1077. This Court went on to find that Officer Dawley had exceeded the scope of a valid warrant. [J-130A/B-1999] – 11

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[4] We need not analyze whether the officer justifiably put his hand into Taylor's pocket under the "plain feel exception." Under the "plain feel exception," an officer may confiscate a non-threatening object if it becomes immediately apparent that it is contraband during a legitimate Terry frisk. Minnesota v. Dickerson, 508 U.S. 366, 375-76 (1993). In the present case, Officer Adams reached into Appellant Taylor's pocket under the reasonable belief that the hard object in Taylor's pocket was a weapon, and not contraband. Therefore, we utilize the principles of Terry and not those of Dickerson to analyze the validity of this search.

**IN THE SUPREME COURT OF PENNSYLVANIA**
**WESTERN DISTRICT**

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| COMMONWEALTH OF PENNSYLVANIA | : | No. 34 W.D. Appeal Docket 1999 |
| Appellee | : | Appeal from the Order of the Superior Court entered October 31, 1997 at No. 52 PGH 1997, reversing the |
| v. | : | Order of the Court of Common Pleas of Allegheny County entered December 18, |
| ANTHONY TAYLOR | : | 1996 at No. CC 9502985 |
| Appellant | : | ARGUED: September 14, 1999 |
| COMMONWEALTH OF PENNSYLVANIA | : | No. 80 W.D. Appeal Docket 1998 |
| Appellee | : | Appeal from the Order of the Superior Court |
| v. | : | entered October 31, 1997 at No. 53 PGH |
| JOHN MAHONE, JR. | : | 1997, reversing the Order of the Court of |
| Appellant | : | Common Pleas of |
| | : | Allegheny County |

: entered December 18,
: 1996 at No. CC
: 9516023
:
: ARGUED: September
: 14, 1999

## CONCURRING AND DISSENTING OPINION

**MR. JUSTICE NIGRO** **DECIDED: May 23, 2001**

I agree with the opinion announcing the judgment of the court ("opinion of judgment") that the search of the basement exceeded the scope of the warrant for the G-Service Convenience Store. Unlike the opinion of judgment, however, I do not believe that the search of the basement was justified as a legitimate protective sweep and therefore, I must also respectfully dissent.

[J-130A/B-1999]

The government bears a heavy burden of proving that a warrantless search was constitutional. United States v. Jeffers, 342 U.S. 48, 51 (1951); United States v. Brightwell, 563 F.2d 569, 574 (3rd Cir. 1977). As the opinion of judgment notes, in Maryland v. Buie, 494 U.S. 325 (1990), the United States Supreme Court held that an arresting officer may only conduct a warrantless protective sweep of areas beyond the immediate scene of an arrest if the officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably justify the officer in believing that the areas harbor an individual posing a danger to the officer or others. Id. At 327.[1] "[W]hile officers need not have probable cause to believe a dangerous third person is present, the mere possibility of such a presence is not enough [to justify a protective sweep]. Instead, police must

[1] This is the standard for a second level search as described by the opinion of judgment.

have specific and articulable grounds sufficient to support a reasonable belief that a person posing a danger is present." Hayes v. Nevada, 106 Nev. 543, 551, 797 P.2d 962, 967-69 (1990). Blanket sweep searches of premises following the arrest of someone inside the premises are patently unconstitutional. Thus, courts reviewing suppression motions must carefully review the reasons given by police officers for conducting protective sweeps so that officers do not engage in warrantless sweep searches as a pretext for substantive searches. See id. 797 P.2d at 967-69; United States v. Colbert, 76 F.3d 773, 778 (6th Cir. 1996) (allowing police to conduct a protective sweep because they do not know whether or not another person may be in the home not only creates an incentive for police to remain ignorant of who is in the home in order to be able to conduct a protective sweep, but also is contrary to the requirement in Buie that the police have an articulable basis to support their reasonable suspicion of danger in the areas to be swept).

[J-130A/B-1999]

In my view, the Commonwealth failed to present specific and articulable facts in the instant case that demonstrate that the police officers reasonably believed that there were individuals in the basement who posed a danger to them.[2] I also agree with Judge Olszewski's concurring

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[2] The opinion of judgement picks out a few isolated statements made by various Commonwealth witnesses and concludes that based on these statements, the officers involved in the search of the convenience store must have feared that dangerous third parties were located in the basement. However, none of the Commonwealth's witnesses testified that they suspected potentially dangerous third parties in the basement. Rather, the Commonwealth's witnesses explained that they entered the basement simply because it was easily accessible to the convenience store. Moreover, in its argument to this Court, the Commonwealth does not rely on the witnesses' statements cited by the opinion of judgment but rather, only argues that the search was a legitimate protective sweep due to the possibility that other individuals may have been present in the basement because of its accessibility from the convenience store. Thus, based on my reading of the record and the argument framed by the Commonwealth, I disagree with the opinion of judgment that the Commonwealth presented the specific and articulable facts necessary to

opinion that no such reasons are present in the record. See Super. Ct. Op. At 2 (Olszewski, J., concurring) (nothing in suppression court's findings indicates that following arrest of Gooden, the officers had reasonable fear of a threat to their well-being). The opinion of judgment notes that Officer Adams testified that his first instinct was to go downstairs in order to secure the basement. However, Officer Adam never articulated why he felt the need to secure the basement, much less offered any specific facts as to why he reasonably believed there were persons present in the basement who posed a danger to him or the other officers. Although Officer Adams stated that he saw Taylor and Mahone go into the convenience store prior to the search, he did not further elucidate that he believed that they were in the basement when he entered the

[J-130A/B-1999]

convenience store[3] or that he had reason to believe that either Taylor or Mahone posed a danger to him. Given this testimony, I simply cannot agree with the opinion of judgment that Officer Adams conducted a constitutional protective sweep since the search was based on no more than the mere possibility that dangerous third parties may have been present in the basement. See Hayes, 106 Nev. At 551, 797 P.2d at 967.[4]

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satisfy its burden of proving that the warrantless search of the basement was a legitimate protective sweep. See Buie, 494 U.S. at 327; Jeffers, 342 U.S. at 51.

[3] According to the record, Officer Adams immediately searched the basement upon entering the convenience store. There is no evidence that Officer Adams took note of the people present in the convenience store and determined that Taylor and Mahone were missing.

[4] Contrary to the opinion of judgment, I also believe that this case is distinguishable from Commonwealth v. Norris, 498 Pa. 308, 446 A.2d 246 (1982). In Norris, this Court upheld the police officers' sweep of the appellant's bedroom after the officers arrested appellant in his living room because the officers had "every reason to believe" that a firearm was available to the occupants of the apartment and that one of the usual occupants of the apartment, the appellant's brother, was unaccounted for. Id. at 315, 446 A.2d at 249; see also, Commonwealth v. Curry, 343 Pa. Super. 400, 494 A.2d 1146 (1985) (police properly conducted a

Therefore, since I believe that Commonwealth failed to present specific and articulable facts necessary to justify a protective sweep, I would reverse the Superior Court's order denying Appellants' motions to suppress the evidence obtained by the officers from the basement. See United States v. Akrawi, 920 F.2d 418, 420-421 (6th Cir. 1990) (protective sweep of second floor following arrest on first floor was unconstitutional where agents would not articulate a specific basis for fear that second floor harbored dangerous persons and agents encountered no violence or resistance in entering home).[5]

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protective sweep of home because a dangerous shooting incident had just occurred and the gun was not yet accounted for). Here, neither Officer Adams nor Constable McIntyre testified that they recognized that Taylor and Mahone were unaccounted for when they entered the convenience store or that they had reason to believe that Taylor and Mahone possessed weapons or otherwise posed a threat to them.

[5] As I would hold that the officers were not justified in searching the basement, I would also necessarily hold that the officers improperly searched Taylor and the coats hanging in the basement. However, even if I believed that the officers were warranted in conducting a protective sweep of the basement, I disagree with the opinion of judgment that Officer Adams' seizure of the pill bottle from Taylor was constitutional. In my view, although Officer Adams may have had reasonable suspicion to frisk Taylor in order to insure that he was not armed, once Officer Adams patted Taylor's pocket and felt a cylinder object of approximately four inches in length and one and three-quarters in diameter, which he determined was neither a gun nor a knife, Officer Adams was not constitutionally justified in further searching Taylor's pocket and seizing the pill bottle. See Terry v. Ohio, 392 U.S. 1, 27 (1968); Commonwealth v. E.M., 588 Pa. 16, 26-28, 735 A.2d 659, 660-61 (1999).

I agree with the opinion of judgment that Constable McIntyre's search of the coats was not a proper search incident to arrest and thus, the Superior Court's order suppressing the evidence obtained from the coats should be reversed.

Mr. Chief Justice Flaherty and Mr. Justice Zappala join in the concurring and dissenting opinion.

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SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

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| COMMONWEALTH OF PENNSYLVANIA | : | |
| Appellant | : | NO. 52 |
| -v- | : | PITTSBURGH, 1997 |
| ANTHONY TAYLOR | : | |
| - - - - - - - - - - - - - - - - - - - | : | |
| | : | |
| COMMONWEALTH OF PENNSYLVANIA | : | |
| Appellant | : | |
| -v- | : | |
| JOHN MAHONE, JR., | : | NO. 53 |
| | : | PITTSBURGH, 1997 |

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgement of the Court of Common Pleas of ALLEGENY County be, and the same is hereby REVERSED, CASE REMANDED, JURISDICTION RELINQUISHED.

BY THE COURT:

/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

DATED: October 31, 1997

J. A35006/97

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| COMMONWEALTH OF PENNSYLVANIA | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | : | |
| ANTHONY TAYLOR, Appellee | : | NO. 00052 PGH 1997 |

Appeal from the Order dated December 18, 1996 in the Court of Common Pleas of Allegheny County, Criminal No. CC9502985

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| COMMONWEALTH OF PENNSYLVANIA | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | : | |
| JOHN MAHONE, JR., Appellee | : | NO. 00053 PGH 1997 |

Appeal from the Order dated December 18, 1996 in the Court of Common Pleas of Allegheny County, Criminal No. CC9516023

BEFORE: POPOVICH, SAYLOR, AND OLSZEWSKI, JJ.

MEMORANDUM: FILED: October 31, 1997

This is a consolidated appeal by the Commonwealth from two suppression orders entered in the Court of Common Pleas of Allegheny County granting the motions of Appellees, Anthony Taylor and John Mahone, Jr., to

suppress narcotics which were seized from them during execution of a search warrant.[1] Because we conclude that the suppression court erred in granting Appellees' motions, we reverse its orders and remand the matter for trial.

The Duquesne Police Department, in response to numerous complaints about drug trafficking activity which was taking place at the G-Service Convenience Store at 418 Crawford Avenue in Duquesne, Pennsylvania, sent a surveillance officer to that location. On December 13, 1994, and January 4, 1995, the officer maintained surveillance for more than three hours and recorded his observations concerning the patrons who visited the establishment and the length of time that they were in the store. Based upon the number of people and the time that they spent in the store, the officer completed an affidavit of probable cause, and obtained a search warrant authorizing the police to search the following persons and premises for crack cocaine, drug paraphernalia, and proof of occupancy:[2]

> Person of Eric Gooden –B/M- Age 19-Dark Skinned
> 418 Crawford Ave(.) Duquesne (.) PA 15110—Corner of Crawford & 5th Street—2 story White Brick. A white sign is above the entrance labled (six) "G-Service Convenience Store (") & 2 phone numbers 466-1071 and 466-1061 painted in red (also a picture of a car on the sign) (.)

On January 20, 1995, a search team effectuated the search warrant. They entered the G-Service Convenience Store and searched it, finding Gooden and a significant quantity of crack cocaine behind the counter. One of the

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[1] The Commonwealth has certified in its notice of appeal that the suppression orders effectively terminated or substantially handicapped its prosecution of the cases. See, Commonwealth v. Malinowski, 543 Pa. 350, 671 A.2d 674 (1996); Commonwealth v. Dugger, 506 Pa. 537, 486 A.2d 382 (1988);Pa. R.A.P. 311 (d).

[2] Prior to the issuance of the warrant, a controlled purchase of crack cocaine was made from the convenience store with the assistance of a confidential informant.

officers and the constable for the City of Duquesne were then directed to go down the steps into the basement of the building and continue the search. In the basement, they encountered Appellees, Anthony Taylor and John Mahone, Jr.. Taylor was seated in a barber's chair with a black plastic apron covering his torso and Mahone was cutting his hair. There was one other barber's chair in the basement, as well as all of the other equipment commonly found in a barbershop.

When the officer announced that they were police officers conducting a search for drugs, he noticed Taylor's hands moving underneath the plastic apron. Fearing that Taylor might be reaching for a weapon, the officer removed the apron and conducted a pat-down search of Taylor, at which time he felt a hard object in Taylor's pocket. Upon removing the object, the officer discovered it to be a plastic prescription bottle which appeared to contain crack cocaine. After searching and handcuffing Taylor, the officer decided to search and handcuff Mahone; however, nothing was found as a result of this search. The officer then instructed the constable to search two coats that belonged to Taylor and Mahone and were hanging on the coat rack in the basement. Additional pieces of crack were found in Taylor's coat and several baggies containing marijuana were found in Mahone's coat.

Taylor and Mahone were each subsequently charged with possession of a controlled substance and possession of a controlled substance with intent to deliver, and both filed motions to suppress the evidence seized from them. The suppression court granted these motions, finding that although the search warrant was valid, the searches of Taylor and Mahone exceeded the authority granted to the officers; accordingly, the evidence seized as a result of the searches was suppressed. The Commonwealth thereafter filed this timely appeal, in which it raises a single issue:

> Whether the trial court erred in suppressing evidence where the search of the basement was within the scope of the search warrant,

where Appellee Taylor's actions caused the officer to fear for his safety, and where the coats were capable of containing the type of contraband for which the police were searching?

"[W]hen reviewing the Commonwealth's appeal from the decision of a suppression court, we must consider 'only the evidence of the defendant's witnesses and so much of the evidence for the prosecution as read in the context of the record as a whole remains uncontradicted.'" Commonwealth v. Elliot, 416 Pa.Super. 499, 501, 611 A.2d 727, 728 (1992). Upon review, this court's responsibility is "to determine whether the record supports the factual findings of the court below and the legitimacy of the inferences and legal conclusions drawn from those findings." Commonwealth v. Elslager, 349 Pa.Super. 217, 224, 502 A.2d 1354, 1358 (1985).

In this case, the suppression court concluded that it was clear from the search warrant that the purpose of the search was to discover drug activity at the G-Service Convenience Store, and that accordingly, the premises to be searched were Gooden's business and his residence at 418 Crawford Avenue. The court further noted that "there was nothing in the warrant or affidavit of probable cause which would indicate that the barbershop's business was a source of drug activity." Opinion, Cashman, J., 2/6/97, p.5.

While we agree with the suppression court that because the activities occurring in the convenience store were the subject of the police investigation, the search of the barbershop was outside the scope of the warrant, we do not conclude that such search was without legal justification. Rather, having carefully reviewed the facts of record in this case, we conclude that under the surrounding circumstances, the search of the barbershop was conducted as part of a legitimate protective sweep of the premises in conjunction with the arrest of Gooden.

In Commonwealth v. Curry, 343 Pa.Super. 400, 404, 494 A.2d 1146, (1985), the Superior Court noted:

> The United States Supreme Court has recognized that there are "exigent circumstances" which justify a warrantless search incident to an arrest. The rationale underlying these exceptions to the warrant requirement is to ensure the safety of police officers and to prevent the destruction or removal of evidence. Chimel v. California, [395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)]; Coolidge v. New Hampshire, [403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)]; Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). In light of this rationale, the Pennsylvania Supreme Court has ruled that police may search the entire building incident to an arrest, for the purpose of seeking other people who may threaten the officer's well being, if the officers have reason to believe that others are present. Commonwealth v. Norris, 498 Pa. 308, 446 A.2d 246 (1982) . . . .

Here, it is unclear from the record whether there was a door which physically separated the first floor of the convenience store from the basement; however, it is undisputed that in order to enter the barbershop, one had to enter the convenience store and then descend a series of steps into the basement. Although there is no evidence which would indicate that the activity in the barbershop was being conducted in conjunction with the business of the convenience store, the record reveals that persons entering the building could pass freely between the store on the first floor and the barbershop in the basement; indeed, one had to enter the barbershop by walking through the convenience store. Thus, under these circumstances, the officers were justified in conducting a protective sweep of the basement of the building after they arrested Gooden on the first floor, since there was the possibility that there could be other

individuals on the premises who could threaten the officers' safety.

Furthermore, once the officers entered the basement, encountered Taylor and Mahone, and announced their purpose, they were justified in searching Taylor for a potential weapon. When Taylor observed the officers, he began moving his hands beneath the barber's apron in a manner which led one of the officers to suspect that he was reaching for a weapon. "It is beyond question that a police officer has a narrowly drawn authority to conduct a reasonable search for weapons, or a protective pat-down, where, as here, the officer reasonably believes that criminal activity is afoot, Commonwealth v. Canning, 402 Pa. Super. 438, 440, 587 A.2d 330, 331 (1991), and that the suspect may be armed and dangerous, Terry [v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L.Ed.2d 889 (1968)]." Commonwealth v. Stackfield, 438 Pa. Super. 88, 94, 651 A.2d 558, 560 (1994).

Upon feeling a hard object in Taylor's pocket, the officer was justified in searching the pocket to insure that no dangerous weapons were concealed therein. "'[U]nder the law of the Commonwealth, a more intrusive search of a suspect's person following a protective pat-down search would only be justified...where the officer reasonably believed he had felt what appeared to be a weapon.'" Stackfield, supra, 438 Pa. Super. At 96, 651 A.2d at 561, quoting In The Interest Of S.D., 429 Pa. Super. 576, 582, 633 A.2d 172, 175 (1993). Thus, the search of Taylor's pocket which revealed crack cocaine in a hard plastic prescription bottle was lawful.

Finally, the officers' search of the coats belonging to Taylor and Mahone was lawful, in light of the fact that the officers had just found contraband in Taylor's possession and could have reasonably believed the coats, which were located within ten feet of the two men, to be a common place where either contraband or weapons could be hidden. Accordingly, we perceive nothing unlawful in the officers' actions.

Because the officers' entry into the basement and the searches of the Appellees and their coats were lawfully conducted, the evidence seized as a result of the searched was admissible and should not have been suppressed. Accordingly, the orders of the suppression court are reversed, and the cases are remanded for trial.

Orders reversed; cases remanded; jurisdiction relinquished.

POPOVICH, J., files a Dissenting Statement.

OLSZEWSKI, J., files a Concurring Memorandum.

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| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| Appellant | : | |
| v. | : | |
| ANTHONY TAYLOR, | : | |
| Appellee | : | No. 00052 Pittsburgh 1997 |

Appeal from the ORDER Dated December 18, 1996, In the Court of Common Pleas of ALLEGHENY County, CRIMINAL, No. CC9502985

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| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| Appellant | : | |
| John Mahone, JR., | : | |
| Appellee | : | No. 00053 Pittsburgh 1997 |

Appeal from the ORDER Dated December 18, 1996, In the Court of Common Pleas of ALLEGHENY County, CRIMINAL, No. CC9516023

BEFORE: POPOVICH, SAYLOR, and OLSZEWSKI, JJ.

CONCURRING MEMORANDUM BY OLSZEWSKI, J.:

I write separately because I respectfully disagree with my esteemed colleague's conclusion that the entry into the barbershop is covered by the protective sweep exception to the warrant requirement. Before officers may conduct a protective sweep, they must have reason to fear a threat to their well being. See Commonwealth v. Curry, 343 Pa. Super 400, 404, 494 A.2d 1146, 1148 (1985). Nothing in the findings of the suppression court indicates the officers had a reasonable fear of such a threat.

I note, however, that the barbershop in the basement of the G-Service Convenience Store was open to the public. The government's intrusion into the barbershop was, consequently, lawful because areas open to the general public can not support a reasonable expectation of privacy. See Commonwealth v. Gordon, 546 Pa. 65, 72-75, 683 A.2d 253, 257-57; Commonwealth v. Brundidge, 533 Pa. 167, 172-74, 620 A.2d 1115, 1118-19 (1993); Commonwealth v. Perdue, 387 Pa.Super. 473, 482-84, 564 A.2d 489, 494 (1989). Once the officers were in the barbershop, the movement of Taylor's hands under the apron provided reasonable and articulable suspicion for a pat-down search. See Commonwealth v. Lagana, 517 Pa. 473, 482-84, 537 A.2d 1351, 1354 (1988). The pat-down revealed a hard object. When considering the proximity of the cocaine found in the convenience store upstairs, the officers had probable cause to believe the hard object contained narcotics. The exigent circumstance arising from the potential for the destruction of evidence permitted the officers to conduct a warrantless search of Taylor's person. See Commonwealth v. Roland, 517 Pa. 371, 376-77, 637 A.2d 269, 270 (1994). The discovery of cocaine on Taylor provided probable cause to search the coats in the barbershop. Once again the warrant requirement was excused by exigent circumstances. Consequently, the officers complied with the requirements of both the 4th Amendment to the U.S. Constitution and Article 1, Section 8 of the Pennsylvania Constitution.

For the foregoing reasons, I concur.

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| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| Appellant | : | |
| ANTHONY TAYLOR, | : | |
| Appellee | : | No. 00052 Pittsburgh 1997 |

Appeal from the Order of the Court of Common Pleas of Allegheny County, Criminal Division at No. CC9502985

| | | |
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| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| Appellant | : | |
| John Mahone, JR., | : | |
| Appellee | : | No. 00053 Pittsburgh 1997 |

Appeal from the Order of the Court of Common Pleas of Allegheny County, Criminal Division at No. CC9516023

BEFORE: POPOVICH, SAYLOR, AND OLSZEWSKI, JJ.

DISSENTING STATEMENT BY POPOVICH, J.:

I respectfully dissent from the decision of the Majority. Rather, I would affirm based upon the reasoning of the court below.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

ANTHONY TAYLOR

vs.

JOHN MAHONE, JR.

CRIMINAL DIVISION
CC No. 9502985
Superior Court No. 00052PGH97
CC No. 9516023
Superior Court No. 00053PGH97

**OPINION**

JUDGE DAVID R. CASHMAN
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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

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| COMMONWEALTH OF PENNSYLVANIA | ) CC No. 9502985 |
| vs. | ) Superior Court No. 00052PGH97 |
| ANTHONY TAYLOR | ) CC No. 9516023 |
| vs. | ) Superior Court No. 00053PGH97 |
| JOHN MAHONE, JR. | ) |

**OPINION**

The Commonwealth of Pennsylvania, (hereinafter referred to as "Commonwealth"), has filed the instant appeal as a result of this Court's Order Court granting the suppression motions filed by the defendants in these cases. In response to the notices of appeal, the Commonwealth was directed to file a statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) with respect to both cases. Complying with that directive the Commonwealth has raised one issue only with regard to this Court's suppression ruling, which issue is identical in both cases. The Commonwealth has contended that this Court erred in suppressing the evidence seized when the searches of the defendants and their property were not outside the scope of the search warrant. In order to understand this contention, a brief review of the facts giving rise to the issuance of the search warrant, and the subsequent searches made allegedly pursuant to it must be made.

The Duquesne Police Department had received numerous complaints about drug trafficking activity taking place at the G-Service Convenience Store located at 418 Crawford Avenue in Duquesne, Pennsylvania. In response to those complaints, the surveillance officer was sent to that

location to observe the activity at or near that store. On December 13, 1994 and January 4, 1995, that officer maintained surveillance of the store for more than three hours and recorded his observations concerning the patrons who visited this establishment and the length of time that they were in the store. Based upon the number of people and the time that they has spent in the store, an affidavit of probable cause was completed and submitted to the local district magistrate requesting that search warrants be issued for the G-Service Convenience Store and the residence of that store's proprietor, Eric Gooden, (hereinafter referred to as "Gooden").

On January 20, 1995, search warrants were obtained for these two locations and the police effectuated those searches. It is the search of the G-Service Convenience Store which is the subject of the current appeals. The arresting police officers went into the G-Service Convenience Store and searched the premises finding Gooden and a significant quantity of crack cocaine behind the counter. Having found this contraband, two of the members of the search team were directed to do down the steps of this building into another area and continue the search. In the basement of this building, a barbershop business was being conducted. That business had two barber chairs and all of the necessary equipment one would expect to find in a barbershop.

When the officers entered this barbershop, the observed Anthony Taylor (hereinafter referred to as "Taylor"), seated in a barber's chair with a black plastic apron covering his torso, getting a hair cut from John Mahone, Jr., (hereinafter referred to as "Mahone"). One of the officers, Richard Scott Adams announces that they were police officers conducting a search for drugs. Officer Adams testified that he observes Taylor's hands moving under the apron and he removed the apron and decided to search Taylor for a potential weapon. During his search he felt a hard object in Taylor's pocket which was subsequently removed and that object7, a plastic prescription bottle,

appeared to contain crack cocaine. Once Taylor was searched and handcuffed, Officer Adams decided to also search and to handcuff Mahone; nothing was found as a result of this search. Officer Adams then instructed a fellow officer to search the two coats that were hanging on the coat rack. These coats belonged to Mahone and Taylor and the searches of these coats revealed that Taylor had additional pieces of crack cocaine in his coat and Mahone has several baggies containing marijuana. The results of these searches, both upstairs and downstairs, provided the predicate for the criminal prosecutions filed against Mahone, Taylor and Gooden.

Counsel for the three defendants each filed an omnibus pre-trial motion alleging the invalidity of the search warrant and the subsequent searches. Following a pre-trial hearing on these motions, it was determined that while the search warrant was valid, the searches of Mahone and Taylor exceeded the authority given to these police officers and, accordingly, the evidence that was seized as a result of those searches was suppressed. The granting of these suppression motions substantially hampered or terminated the Commonwealth's ability to prosecute these defendants thereby enabling the Commonwealth to file the instant appeals. See ***Commonwealth v. Malinowski, Pa., 671 A.2d 770 (1996).***

The Commonwealth maintains that the search warrant that it received allowed police officers to search the entire property known as 410 Crawford Avenue, Duquesne, Pennsylvania. However, this current contention ignores the position that the Commonwealth took at the time of the suppression hearing when the validity of this warrant was first questioned. The Commonwealth maintained that the affidavit of probable cause attached to the warrant demonstrated the continuous patter of drug activity at the convenience store since that affidavit detailed the comings and goings of various individuals at the G-Service Convenience Store. Not only did the affidavit describe the gender, race and clothing of the individuals who went in and

out of the store but, also, it detailed the length of time that they stayed in the store. A review of this affidavit indicates that almost all of the individuals who were listed in the affidavit of probable cause, rarely stayed longer than two minutes in the G-Service Convenience Store and in most cases, not longer than a minute.

It is clear from reading both of the search warrants that were filed in these cases that the object of this investigation was Gooden and that it was Gooden's business and his residence that was sought to be searched. The affidavits contained in both search warrants contain the same introductory paragraph which identifies the scope of the search that was sought.

> On two different occasions, this officer (R. Scott Adams) was in a surveillance position located in the vicinity of S. 5th Street & Crawford Avenue, Duquesne, PA 15110. The reason for the surveillance; complaints of Drug-Trafficking at the G-Service Convenience Store located at this intersection. The proprietor of the Store is a Eric Gooden, AKA MeMe Crack. I have known Eric Gooden for at least 20 years. The surveillance dates were 12-13-94 and 1-4-95.

There was nothing in the warrant or the affidavit of probable cause which would indicate that the barbershop's business was a source of drug activity. Even the Commonwealth in its argument in response to the motion filed by Gooden in challenging the validity of the issuance of the warrant indicated that the search was to discover drug activity at the G-Service Convenience Store. The Commonwealth argued that the activity as cataloged by Officer Adams clearly indicated that individuals were going into this convenience store for the purpose of obtaining drugs and that the minimal time that they spent in the store obviously indicated drug activity was taking place. It would be difficult, if not

impossible, to imagine someone obtaining a hair cut within on to two minutes if one were to accept the Commonwealth's premise that the duration of time within the building pointed out drug activity. The warrant was for the convenience store and not a barbershop and it is the specificity of that warrant that mandated the suppression of the evidence seized from Mahone and Taylor.

> A search warrant directed against an apartment house, or other multiple-occupancy structure will be held invalid for lack of specificity if it fails to describe the particular room or subunit to be searched with sufficient definiteness to preclude a search of other units. *Commonwealth v. Carlisle*, 517 Pa. 36, 40, 534 A.2d 469, 471 (1987) (citations omitted). Where the description provided is precise enough to enable the officer to ascertain and identify, with reasonable effort, the place intended, and where probable cause exists to support the search of the area so designated, a warrant will not fail for lack of particularity. *In re Search Warrant B-21778*, 341 Pa. Super. 350, 359, 491 A.2d 851, 856 (1985). Moreover, a warrant directing a search of more than one living unit is valid only if there is probable cause that all are being used for the unlawful purposes involved. *Commonwealth v. Copertino*, 209 Pa. Super. 63, 224 A.2d 228 (1966). Finally, the reviewing court must make a practical, commonsense decision whether the place to be searched has been specified with sufficient particularity. *Carlisle, supra*, at 42, 534 A.2d at 472.

*In Interest of Wilks, 418 Pa. Super. 73, 613 A.2d 572, 579 (1992).*

While it was unclear as to whether or not there was a door which physically separated the first floor from the basement, it was clear that in order to enter this barbershop that one had to enter into the convenience store and then go down a series of steps to the basement barbershop. It was also clear that this barbershop was a separate and distinct facility from the convenience store. It had two barber chairs, it had the type of equipment that one would normally associate with a barbershop and, in fact, the activity that Officer Adams viewed as he entered the barbershop was a barber cutting a customer's hair. The searches of Taylor and Mahone obviously exceeded the scope of the warrant issued and, accordingly, the items that were seized as a result of these illegal searched had to be suppressed.

CASHMAN, J.

DATED: 2/5/97